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CONTENTS

Recurring payments of Capital Assets — When deductible? 97
by J. H. Greenwell

Adverse Possession 100
Contributed

What does Consortium include? 102
by Scrutator

Bequests of Businesses 104

Case Notes:

Bills of Exchange — Cheney v. Holschier 110
Building Contract — Levine v. Kelly 110
Companies — Parr v. Australasian Asiatic Trading and Engineering Co. Pty. Ltd. 110
Landlord and Tenant — Hamilton v. Porta 111
Morris v. English Scottish & Australian Bank Ltd. 111
Registration of Title to Land — King v. Smail 112

Supplement—Solicitors Trust Account Regulations

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RECURRING PAYMENTS OF CAPITAL ASSETS — WHEN DEDUCTIBLE?

by

J. H. GREENWELL
Barrister-at-Law

Cooper v. *Commissioner of Taxation*, [1957] A.L.R. 1183, is the most recent pronouncement by the High Court upon the question when recurring payments made for a capital asset may be treated as income to the recipient or deductible by the payer. The decision makes clear the comparative rarity of such a situation and the limited operation of the principles enunciated in *Egerton-Warburton* v. *Federal Commissioner of Taxation* (1934), 51 C.L.R. 568. In *Cooper's case* the appellant was the owner of an hotel who had leased the property to six brothers, one of whom had later sold his one-sixth interest to the appellant. Later still the appellant commenced proceedings against the five remaining lessees alleging breaches of covenants contained in the lease, and seeking possession and damages. The action was settled and it was the terms of the resulting compromise which gave rise to the appeal. The appellant agreed to acquire the lessee's five-sixths interest in the lease and covenanted to pay to each of them an annuity of £780 for a period of twelve years, to be charged on the leasehold interests. It was stipulated that these interests were not to become merged in the appellant's reversion. He also purchased their interests in the business and covenanted to pay an annuity of £1,000 to each in consideration of the purchase. In the year of income he paid £3,825 pursuant to these obligations and he claimed part of this sum was deductible. KITTO, J. dismissed the appeal.

In Australia the starting point for a consideration of the appellant's claim must be the decision in *Egerton-Warburton* v. *Federal Commissioner of Taxation* (*supra*). There the court recognized that an asset may be sold and the vendor may receive an annuity, a share of profits or some such payment which will be income in the vendor's hand and deductible by the payer. In that case a father conducting a farming and orcharding business sold the land to his sons, who agreed to pay an annuity to the father during his life and after his death an annuity to his widow, and after the death of both father and widow the sum of £10,000 to certain children.

The reasons for decision were stated somewhat generally. Of course, merely because the payments were income of the recipient does not involve as a necessary consequence that they are deductible by the payer.

But the court held that the annuities were assessable income. It emphasized that the annuity for the father was

uncertain in duration, and that payable to the widow was uncertain not only in duration but contingent upon her surviving him. There was no evident correlation between the value of the land transferred to the sons and the consideration paid. The transaction was described as bearing "all the marks of a family settlement" (p. 574). From this the court appeared to conclude that the annuity was not a real consideration or price for the land given to the sons although it was a condition to their obtaining it. The court then advanced its reasons for regarding the payments as deductible by the sons. The annuity was charged upon the land from which they produced their assessable income. "The nature of the business (i.e., farming and orcharding) demands the use of land but payment of an annuity is not a necessary incident of carrying on the business. Without the land, however, the taxpayers could not carry on the business and to acquire the land they found it necessary to submit to the liability to pay the annuity" (p. 576).

It may have been thought that the decision was reasonably favourable to claimants for deductions in analogous situations. But it has been described by FULLAGAR, J. as being "of a very exceptional character" and the supposedly wide effect of the decision has been circumscribed by subsequent authority.

In *Colonial Mutual Life Assurance Society Ltd.* v. *Federal Commissioner of Taxation* (1953), 89 C.L.R. 428, the court regarded the disposition in the *Egerton-Warburton case* "as being in substance a family settlement, the transaction, in spite of its form, could not be treated as meaning that the sons were paying for the land a true *price* which was represented in part by the annuity payable to the father. It resembled rather a gift of the land to the sons charged during the father's lifetime with an outgoing analogous to interest on a mortgage and charged with a capital sum payable at the father's death" (at p. 459). The court defined the questions to be asked as "(1) What is the money really paid *for?* and (2) Is what it is really paid for, in truth and in substance, a capital asset?" (p. 454). If so, then the payments are capital payments even though in the form of an annuity. KITTO, J. adopted the same viewpoint in *Cooper's case.* His Honor was faced with the contention that this was not a real sale and purchase. It was a settlement of litigation. The situation, it was argued, resembled a dissolution of partnership effected by one partner buying out the interests of the others. It gave to the transferors an income in the form of an annuity in place of a share in the profits. The argument was thus designed to bring it within the narrow view of the *Egerton-Warburton* decision and to escape from the apparent position that the annuity formed the price for the purchase of a capital

asset. The argument was rejected by KITTO, J., who elaborated his reasons as follows:—"To say that the transaction in the present case was entered into by way of settling pending litigation, and as a method of dissolving a partnership or a relationship resembling a partnership is only to describe the motivating circumstances. It leaves the transaction a purchase and nothing else and the annual payments are in truth only instalments; they do not take the place of the profit the transferors might have made from their leasehold interests, for, apart from anything else they are payable over a period of only twelve years, whereas the lease might have lasted for much longer. The appellant is really not in a different position from any reversioner who has bought an outstanding leasehold interest and agreed to pay a fixed price by instalments. He purchases property with a view to retaining it and putting it to a capital purpose. In my opinion the annual payments which he bound himself to make are simply the price of a capital asset and are therefore of a capital nature and not allowable as deductions under s. 51." The second aspect of *Cooper's case* was the alternative contention that sums paid to the lessees were deductible under s. 88 (1) of the Act. That is to say, that the appellant was a taxpayer who as a lessee of land paid a premium in respect of *land premises or machinery* used for producing assessable income.

The argument crystallized into a problem of whether the amounts were paid in respect of the land, etc. KITTO, J. first concluded that the one-sixth interest which the brother had surrendered prior to the litigation had thereupon become merged in the appellant's fee simple. There thus remained only a five-sixths share in the lease which became vested in the appellant under the compromise. But a share in a leasehold interest was not "land" within the meaning of the section. "Land" there denoted the physical entity and not the legal interest in it. Accordingly, payments in respect of a part interest in the land fell outside the provisions of s. 88 (1).

ADVERSE POSSESSION

CONTRIBUTED

A not uncommon conception that anyone who squats on land for the period of time required by the Statute in force relating to the limitation of actions[a] thereby extinguishes the title of the previous owner will require to be reviewed in the light of the recent decision of the Court of Appeal in England in the case of *Williams Brothers Direct Supply Stores Ltd.* v. *Raftery*, [1957] 3 All E.R. 593.

In this case the plaintiffs had purchased the land in 1937 with the intention, in due course, of developing it and had applied for planning permission in 1948, at which time they went all over the land and measured it. Planning permission, however, was refused. The defendant in the meantime had been occupying the land without the owners' permission, first for the growing of vegetables and subsequently he erected a shed on it for greyhound breeding but did nothing to keep the owners off the land, and having started in 1943 maintained that by 1955 he had completed his "twelve years" and had acquired a title by adverse possession. In an action brought in 1957 by the plaintiffs to recover possession of the land from the defendant it appeared that the matter hinged under s. 5 (1) of the *Limitation Act* 1939[b] on whether the plaintiffs had either been dispossessed or alternatively had discontinued their possession. The County Court judge thought that although the plaintiffs had not consciously discontinued their possession, they had in fact been dispossessed.

On appeal, the Court of Appeal applied the test in *Leigh* v. *Jack* (1879), 5 Ex. D. 264, that "to defeat a title by dispossessing the former owner acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it". The court was of the opinion that having regard to the nature of the property no act inconsistent with the owners' enjoyment of the soil for their purposes (as property owners prevented for the time being from developing) had been done by the defendant, and it was held that the owners were entitled to an order for possession, since their minor acts of user showed that they had never discontinued possession and the acts of the defendant did not amount to dispossession of the owners and the appeal was allowed.

[a] N.S.W., 20 years (*Real Property Suits Limitation Act* 1833 (adopted by 8 Wm. IV No. 3), s. 2); VIC., 15 years (*Limitation of Actions Acts*, s. 8); QLD., 20 years (*The Distress, Replevin and Ejectment Act of* 1867, s. 6); S.A., 15 years (*Limitation of Actions Act* 1936-1948, s. 4); W.A., 12 years (*Limitation Act* 1935-1954, s. 4); TAS., 12 years (*Limitation of Actions Act* 1836, Sch., part II, s. 1).

[b] ibid., N.S.W., s. 3; VIC., s. 9; QLD., s. 11; S.A. s. 6; W.A., s. 5; TAS., s. 3.

Referring to the Statute of Limitations, SIR JAMES MARTIN, C.J., in *Laing* v. *Bain* (1877), Knox 264, at p. 265, said: "The Act was not passed with the object of allowing a person to squat down on the lands of anyone who was not occupying them and to acquire a title against the real owner. That may be, and is, the effect of the Act in certain cases, but the object with which it was passed was to avoid the inconvenience of owners of property having to keep evidence by them for so long". In the same case, HARGRAVE, J., at p. 280, said: "This court would never encourage these intruders, persons who live by going on land which they have never paid a shilling for, in fact mere robbers of land. A title gained by means of the Statute of Limitations without any pretence of any other right must always strike an honest man as a rogue's title, and everyone must feel disgust at seeing an attempt to maintain it".

The judgment in the *Williams Brothers Direct Supply Stores case* tends to show that in order to acquire a title by adverse possession a positive indication of the intention to dispossess as well as mere occupation must be proved.

INTERDUM

by

SCRUTATOR

What does Consortium include?

The law of marriage appears to be a perennial source of litigation. A novel and difficult question fell for decision in *Kirkham* v. *Boughey*, [1957] 3 All E.R. 153. The facts were these: The plaintiffs, who were husband and wife, were involved in a motor accident with the defendant, who admitted liability for it. Injuries suffered by the husband were slight, but those suffered by the wife were severe and necessitated more than four months in hospital. When at the end of that period she returned home she was able to do light housework; by seven months later she had made a good recovery. The question litigated arose out of a claim by the husband for loss of wages. At the time of the accident he was on a month's leave from Lagos, where he had employment as a lift-erector at a salary of £30 a week. In his anxiety about the condition of his wife and the welfare of their two children of tender years he did not return to his African employment when his leave expired, as he had intended to do, although work at that salary was available there at all material times. While his wife was still a patient in hospital he obtained work as an electrician at £8 a week near his home in England and had the children looked after between 8 a.m. and 5 p.m. Work as a lift-erector at which he would have earned a higher wage, was not then available locally, but after his wife's return home he obtained such work in London at £13/10/- a week. In an action of negligence both spouses claimed damages for personal injuries. The husband claimed also special damages for loss of earnings representing the difference between the £30 a week that he would have earned at Lagos and the amount that he actually earned over the period during which it was reasonable for him not to have returned to Africa.

DIPLOCK, J., who tried the action, assessed the plaintiff wife's damages at £1,785/18/2 and the plaintiff husband's at £255/10/7. He held that the husband was not entitled to damages for loss of earnings, because the loss did not flow from the injuries which he himself suffered and his right to recover damages in respect of the injuries which his wife suffered was limited to damages for loss of *consortium*, together with the cost of her medical treatment *etc.* and damages for loss of *consortium* did not extend (as was admitted) to his loss of earnings, which was therefore *damnum absque injuria*. His lordship ruled that

visits by a spouse to a wife in hospital may be a proper step in mitigating the damage suffered by loss of *consortium* by reducing the period during which the *consortium* is lost; but if the sole justification for a visit is the comfort or pleasure that it gives to the husband then its cost is not recoverable.

SOLICITORS TRUST ACCOUNTS

The Solicitors Trust Account Regulations in New South Wales, published in the Government Gazette No. 8 of 26 January 1945, have been repealed and replaced by new regulations commencing 1 July 1958 and are included in a supplement to this Part of the Journal for the information of Solicitors in New South Wales.

BEQUESTS OF BUSINESSES*

A testamentary gift of a business would, at first glance, seem to present no very great difficulty to an executor or trustee, but the courts have been called upon from time to time to determine what passes under the term "business". As in all cases of interpretation, regard must be had to the purport of the will in general and to the terms of the gift in particular. A business as a whole is made up of many parts, e.g., goodwill, capital, stock-in-trade, plant, machinery, vehicles, premises, and so on. Where a testator bequeaths his business without any qualification, there would seem to be little difficulty, and it has been said that the meaning to be applied to the word is the same as that intended when a man sells his business, viz., the undertaking or enterprise itself, not merely the process of carrying it on (*Re Rhagg, Easten* v. *Boyd,* [1938] 3 All E.R. 314).

Unfortunately, in many cases the word business has been followed by the enumeration of certain details which would appear to modify or limit the bequest. In such cases the court has been asked to apply the maxim *expressio unius est exclusio alterius* and so give a narrow and limited view of what the bequest embraced. Thus, in *Rhagg's* case (*supra*), the testator bequeathed to his clerk, B., "my business of a solicitor and the office furniture, law books and other articles in my office". B. was a qualified solicitor who had been employed by the testator as his clerk, but subsequent to the making of his will, he had entered into a partnership agreement with B. who was to be entitled to a half share in the net profits. The court held that the bequest gave the legatee all the testator's interest in the business, including sums advanced to clients, actual or potential, since they were as much assets of his business as a solicitor as are plant and stock to a manufacturer; money in the till or at the bank if identifiable with the business; undrawn profits; and sums due or to become due in respect of work done or in progress at his death. The enumeration of the articles mentioned in the bequest could not limit the gift, and the maxim quoted above must be treated with caution, regard being given to the intention of the testator taking the will as a whole.

In a recent case (*Re White (deceased)*, [1958] 1 All E.R. 379) the testator bequeathed his business as a house furnisher as to two-thirds to his wife and as to one-third to H. for their use and benefit absolutely, with a wish that H. should carry on and manage the business as she thought fit. In this case the meaning of the word business as set

* By courtesy of *The Law Journal.*

out in *Rhagg's* case (*supra*) was followed, weight being given to the fact that the testator expressed the wish that the business should be carried on. The gift therefore included all the assets which formed part of the business, including the items in dispute, viz., stock-in-trade, book debts and money owing by trade debtors, and the freehold premises in which the business was carried on.

Goodwill

It has been said that goodwill is nothing more than the probability that the old customers will resort to the old place (*Cruttwell* v. *Lye* (1810), 17 Ves., at p. 346). It was said in *Blake* v. *Shaw* (1860), 2 L.T. 84 that goodwill is applicable to any business established on a profitable basis and, in the circumstances of that particular case, could exist without anything else. The testator "gave and bequeathed unto his foreman B. the goodwill of his business in Aldersgate Street and also the plant and £1,000 sterling for his use and benefit". It was argued on behalf of B. that the gift included stock-in-trade consisting of cloth and ready-made clothes of considerable value, and that this came within the ambit of the word plant in the bequest, but the court held otherwise. The gift was in limited terms and while the goodwill passed to B., the stock-in-trade, household furniture and other similar things did not.

In *Re Betts* (*deceased*), [1949] 1 All E.R. 568 the testator gave to his wife and brother in equal shares the goodwill of his business together with stock, utensils, trade vehicles and plant connected therewith. The testator owned a freehold house, the top floor being converted into a self-contained flat for himself and his wife, the remainder being used for the purpose of the business. It was held that a gift of incorporeal asset such as goodwill, coupled with a number of specified corporeal assets could not be construed as including freehold premises. In *Re Barfield, Goodman* v. *Child* (1901), 84 L.T. 28 it was held that a gift of "all my share and interest in the business carried on by me and . . . as co-partners" must mean more than a shadowy right to goodwill, if, indeed, there be such a thing in a business of the kind in question, viz., a partnership as solicitors. In fact, the words were held to include everything which appeared in the balance sheet, including share in capital and in undrawn profits, stress being given to the words "share and interest".

Undrawn profits

It has already been seen that the gift of a business may include the testator's undrawn profits in that business (*Re Rhagg* and *Re Barfield* (*supra*)). In an earlier case, *Re Beard, Simpson* v. *Beard* (1888), 57 L.J. Ch. 887, a somewhat different view was taken. There, the testator,

who was a partner in business with another, bequeathed all his share right and interest of and in the brewery, public houses, and partnership real estate, and also all debts, chattels, money and personal estate forming part of the assets thereof, to his trustees upon certain trusts as set out in the will. A decision was sought whether a large sum in undrawn profits due to the testator at his death passed as an asset of the business or whether it formed part of the estate apart from the business. The court was of opinion that the sum in question could not accurately be described as a debt due to the partner from the firm as part of his share in the partnership assets, nor could it come within the term "share and interest", and therefore as between the partners the testator was a creditor and not a partner in respect of that debt. The court now takes a larger view and having regard to the decisions in *Re Rhagg* and *Re Barfield* (*supra*), it would seem that the undrawn profits would now be regarded as passing with the business in default of any words in the will to the contrary.

Premises

Where a building is owned and used exclusively for a business, those premises would pass with the gift of the business unless otherwise directed by the will. In *Re White* (*supra*), the testator bought the freehold of the premises which he used exclusively for his business and it was held that those premises were an asset of the business and therefore passed with the gift of the business. A decision to the contrary was made in *Re Dimmock* (1885), 52 L.T. 494, but the facts were different from those in *White's* case. Here, the testator was a partner in a business which was carried on in premises which were owned by him and for the use of which the business paid him a rent. In these circumstances the premises were part of the testator's separate estate and not an asset of the business. In *Re Henton* (1882), 20 W.R. 702, the testator left all his real and personal estate to his trustees upon trust that they should invest such parts as they should think fit in his business and carry on the same until his son attained the age of twenty-one years, and until then to pay out of profits a certain sum for the maintenance of his widow and children. The freehold house in which the business was carried on was owned by the testator and the question whether the house passed with the business was decided by the court in the negative in default of any direct words to that effect in the will. It is submitted that this decision does not conflict with that to the contrary in *White's* case (*supra*), since it was probably based on the fact that the testator lumped all his real and personal estate together and did not exempt therefrom the house in question.

Debts and liabilities

The bequest of a business carries with it the assets of that business subject to its liabilities (*Re Rhagg* (*supra*) at p. 319). As early as 1853 (*M'Neillie* v. *Acton* (1853) 4 D.M. & G. 744), it was held that in default of a direction to the contrary, a direction to carry on a trade or business does not charge the real and personal estate of the testator with debts contracted in the course of that trade. *Re Harland-Peck,* [1940] 4 All E.R. 347, although apparently showing a view to the contrary, is of no assistance. The will included a gift of the testatrix's business and the land occupied by it, the goodwill thereof and the stock-in-trade, machinery, plant and effects employed therein, and the benefit of all subsisting contracts and all book debts and moneys due to her or standing to the credit of her business account at her bankers. In the court below it was held that the debts and liabilities of the testatrix incurred in the business and subsisting at her death should be borne by the residuary estate, but this decision was not contested on the appeal. It is not known therefore on what footing this decision was made, but one may surmise that it was grounded on the fact that no specific provision as to the debts due from the business was made in the will. In the light of the more recent decisions it would appear that the case would not be followed on this point.

Similarly, in *Re Timberlake* (1919), 63 Sol. Jo. 286, it was said that the debts of the business, like any other debt incurred by the testator, must be paid out of the residuary estate and, if that is insufficient, must be borne rateably by the specific legatees and devisees. The report, which is not very comprehensive, states that this decision was arrived at having regard to the terms of the will, but this does not appear to agree with the bequest as stated in the report. However, as the business was insolvent, it was obvious that the estate as a whole would have to pay the debts not covered by the business assets. Another case, the report of which is extremely meagre and, it is submitted, must now be considered in the light of *Re White* and *Re Rhagg* (*supra*), is that of *Re Deller's Estate, Warman* v. *Greenwood,* [1888] W.N. 62. Here the testator left to A. all his estate and interest in the leasehold premises where he carried on business and also "the business now carried on by me . . . and all goodwill, stock-in-trade, fixtures and effects which at the time of my decease shall be employed by me therein, charged nevertheless with and subject to the payment of my trade debts due and owing to me in connection with my said business". It was held that A. was not entitled to the book debts owing to the testator in his business at the time of his death.

Partnership

It was said in *Re Rhagg* (*supra*) that where, in a partnership, one of the partners bequeaths his share in the business, the result can only be to put the legatee in his place in relation to the partner. In such a case, in the absence of any special direction in the will to the contrary, the legatee would take the share formerly held by the testator and would have all the rights of which, under the partnership agreement or under the general law regarding partnership, the testator is able to dispose.

Wills Act 1837, s. 23[a]

Section 23 of the *Wills Act* 1837 provides that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death. This section has been applied to cases in which a testator, being a partner in a business, has by his will bequeathed his share of the business, but who has later acquired the whole business. Thus, in *Re Russell* (1882), 19 Ch. D. 432, the testator was in business partnership with his two brothers, and bequeathed his interest therein for the benefit of his wife with power to her to discontinue the business if she saw fit and to sell it. After making his will the testator acquired the whole business. It was maintained on behalf of the widow that she took an interest in the whole business and not merely in the one-third share as at the date of the will, whereas the other parties interested under the will argued that she was entitled only to the share and not the whole. It was held that the section applied and the widow's interest was in the whole business. In *Re Quibell's Will Trusts*, [1956] 3 All E.R. 679, the testator bequeathed to his trustees the goodwill of his chemist's business and stock-in-trade and effects employed therein together with the premises where the business was carried on and all other assets of the business, on trust to convert the business into a private company, the shares of which were to be held in trust for his wife during her life and then to his daughter absolutely. In fact the company was formed by the testator in his lifetime and he held a number of shares therein;

[a] See N.S.W. *Wills, Probate and Administration Act* 1898-1954, s. 20; VIC. *Wills Acts*, s. 21; QLD. *The Succession Acts* 1867 to 1943, s. 55; S.A. *Wills Act* 1936-1940, s. 26; W.A. *Wills Act* 1837 (adopted by 2 Vict. No. 1), s. 23; TAS. *Wills Act* 1840, Sch., s. 23.

strictly, therefore, the terms of the will could not be carried out, and the question arose whether, on the death of the widow, the daughter was entitled to the shares left by her father. The decision was that the shares did so pass.

It is of interest to consider the case of *Re Mulder, Westminster Bank, Ltd.* v. *Mulder*, [1943] 2 All E.R. 150. Here the testator, who had carried on business with his stepson in equal partnership, drew up his will on the assumption that he owned the whole business and that his stepson was no more than a salaried manager. The will contained a direction that the value of the business should be ascertained by an accountant, the stepson to have an option to purchase at that valuation, the purchase money to be divided between residue and the testator's son. If the option to purchase was not exercised, and naturally the stepson declined the option, the business was to be sold and the money divided as already set out. It was held that the bequest relating to the business was inoperative since the testator's expressed wishes and directions were quite incapable of fulfilment if it was attempted to apply them to a half share, and the maxim *falsa demonstratio non nocet* could not be applied in such a case.

Loss incurred by business

It would appear that where a business is left to trustees upon trust to pay the profits to one or more beneficiaries, any losses incurred by the business, should there be any, should not be charged against those beneficiaries. Thus, in *Gow* v. *Forster* (1884), 26 Ch. D. 672, the profits were to be paid to a daughter during her life, together with the income from the remainder of the estate, with gift over to her children on her death. The business did suffer a loss and it was held that this loss should not be deducted from the daughter's share of the profits but should be written off against capital as was the practice during the testator's lifetime. Similarly in *Re Millichamp, Goodale and Bullock* (1885), 52 L.T. 758, the testator bequeathed the profits to be divided amongst certain relatives, but directed that if there were losses they were to be defrayed out of his estate. For some years there was a profit followed by a year of loss, viz., £904. The income from the testator's estate was £910 and the trustees felt bound to set off the loss against the latter leaving practically nothing for the beneficiaries. It was held that since the will directed that the losses were to be defrayed out of the estate, they must be taken out of the capital of the estate employed in the business, otherwise the beneficiaries would get nothing. The trustees had power to increase or decrease the capital employed in the business.

CASE NOTES

Bills of Exchange

Crossed cheque marked "not negotiable" — condition of work to be done by payee—cheque endorsed and negotiated to third party—whether holder had good title—Bills of Exchange Act 1909-1936, s. 87.—A cheque crossed "not negotiable", drawn by the defendant in favour of M., was given to M., who endorsed it and negotiated it to C., who took it in good faith and for value. After delivery the defendant stopped payment and C. sued the defendant on the cheque. It was alleged by the defendant that the cheque had been given to M. as payment for work to be done for the defendant on condition that M. completed the work by a certain date, which he had not done. It was held that as the condition related to something to be done after delivery, and there being no misrepresentation, it could not be said that there had been a conditional delivery so as to preclude M. and later C. from having a good title and that C. was entitled to recover (*Cheney* v. *Holschier*, [1958] V.R. 64).

Building Contract

Architect's final certificate — conclusive evidence as to sufficiency of works and materials — interpretation — not conclusive as to value.—A building contract provided for the issue by the architect of a final certificate of the value of the works executed by the builder, and that such certificate, with certain exceptions, should be conclusive evidence as to the sufficiency of the said works and materials. It was held that a certificate duly issued under the clause was conclusive only subject to the named exceptions as to the sufficiency of the works and materials and was not conclusive evidence as to the amount payable (*Levine* v. *Kelly*, [1958] Qd. R. 74).

Companies

Investigation of affairs—appointment by Crown of inspector —expenses in s. 136 of the Companies Act 1938 are those of the Crown—no right of inspector to sue the company.—Section 136 (1) of the *Companies Act* 1938* provides that upon application by certain specified proportions of the members or debenture holders of a company the Governor in Council may appoint one or more competent inspectors to investigate the company's affairs and to report thereon as may be directed. Section 136 (9) provides *inter alia* that "The expenses of and incidental to an investigation under this section . . . shall be defrayed" as therein set out. It was held that the expenses referred to are those of the

Crown and not of an inspector and the section did not confer any right on the inspector to sue either the Crown or the company for his expenses (*Parr* v. *Australasian Asiatic Trading and Engineering Co. Pty. Ltd.*, [1958] V.R. 198).

*Cf. N.S.W., *Companies Act* 1936-1957, ss. 116 and 117; QLD., *The Companies Acts* 1931 to 1955, ss. 145 and 146; S.A., *Companies Act* 1934-1956, ss. 156 and 157; W.A., *Companies Act* 1943-1954, ss. 140 and 141; TAS., *Companies Act* 1920, s. 118.

Landlord and Tenant

Sale of residential business by lessee to proposed assignee —lessee remaining in possession after termination of lease — refusal of lessor to consent to assignment — whether refusal reasonable—nature of interest of lessee—Property Law Act 1928, s. 137.—The applicants were the lessees of premises at St. Kilda in which they conducted an apartment house business. The respondent was the lessor. The applicants agreed to sell the business to a third party and undertook to arrange for the assignment to him of the existing tenancy. Application was made to the lessor for his consent to the assignment, but he failed to give consent. The applicants by summons sought a declaration that the lessor had unreasonably withheld his consent to the assignment. It was held that a lessee who remained in possession after the expiration of a lease for a term had a mere personal right to reside therein by virtue of s. 2 (2) of the *Landlord and Tenant Act* 1948, but had no right which was assignable unless a consensual tenancy existed between the parties and the summons was dismissed (*Hamilton* v. *Porta*, [1958] V.R. 247).

Recovery of possession—premises required for reconstruction—and for personal occupation—Landlord and Tenant Act 1948-1954 (N.S.W.), s. 62 (5) (m).—Under s. 62 (5) (m) of the *Landlord and Tenant Act* 1948-1954 (N.S.W.), a permissible ground for a notice to quit is that the premises are reasonably required by the lessor for reconstruction or demolition. It was held that the subsection did not extend to the case where the premises were required by the lessor for reconstruction and for his own occupation —*McKenna* v. *Porter Motors Pty. Ltd.*, [1956] 3 All E. R. 262 followed (*Morris* v. *English Scottish & Australian Bank Ltd.*, [1958] A.L.R. 151 (H.C.)).

Registration of Title to Land

Registration of transfer in favour of mere volunteer — whether title of volunteer free from prior equities—Transfer of Land Act 1954, ss. 42, 43.—On 24 July 1956, Gordon Charles King, being registered as proprietor of a parcel

of land as joint tenant with his wife, Kathleen King, transferred his estate or interest in the land to his said wife. On 17 August 1956 G. C. King and a partner executed a deed of arrangement pursuant to Part XII of the *Bankruptcy Act* 1924-1955 in favour of E. R. Smail as trustee for creditors and the deed of arrangement had received the assent of a majority in number and value of the creditors and was duly registered in compliance with s. 193 of the Bankruptcy Act. On 28 September 1956 the transfer to Kathleen King was lodged for registration and on 11 October 1956 E. R. Smail lodged a caveat claiming an equitable estate in fee simple in the land. As the caveat had been lodged subsequently to the transfer it did not prevent registration of the transfer to Kathleen King, who became registered as proprietor of the entirety in the land. On 8 March 1957 the caveat was amended so as to apply to the land standing in Kathleen King's name alone. Kathleen King moved the court for an order, pursuant to s. 90 (3) of the *Transfer of Land Act* 1954, for the removal of the caveat. The applicant contended that by reason of s. 42 of the *Transfer of Land Act* 1954* in the absence of fraud (which was not here alleged) a volunteer who takes a transfer from a registered proprietor on registration acquires, like a purchaser for value, a title free from equities which affected his transferor. ADAMS, J., at p. 276, said that, although s. 42 in itself afforded no ground for distinguishing between the volunteer and the purchaser for value, and would appear to give paramount effect to registered title in either case, other sections in the Act draw a distinction between the volunteer and the purchaser for value and appeared to justify the conclusion that, upon the registration of dealings subsequent to initial registration under the Act, it is purchasers for value only who were intended to have the benefit of s. 42, and held that the respondent to E. R. Smail was as against the applicant entitled to the estate and interest claimed by the caveat and dismissed the application (*King* v. *Smail*, [1958] V.R. 273).

*Cf. N.S.W., *Real Property Act* 1900-1956, s. 42; QLD., *The Real Property Acts* 1861 to 1956, s. 44; S.A., *Real Property Act* 1886-1945, s. 69; W.A., *Transfer of Land Act* 1893-1950, s. 68; TAS., *Real Property Act* 1920, s. 40.

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